

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,) CASE NO. 8:04CR451
)
Plaintiff,)
)
vs.) MEMORANDUM
)
RICARDO FONSECA,) AND ORDER
)
Defendant.)

This matter is before the Court on the Statement of Appeal of the Magistrate Judge's Order consolidating this case with *United States v. Guillermo Borboa and Jhovannie Reyes*, 8:05CR24, for trial, filed by the Defendant, Ricardo Fonseca (8:04CR451, Filing No. 35).¹ The Appeal, which also includes a motion to sever, is supported by a brief (Filing No. 36). The government has not responded to the Appeal.

Neither did the government submit a brief in support of its motion, as required by NECrimR 12.3(b)(1). The government, in its motion (Filing No. 30), stated that the government relies on Federal Rule of Criminal Procedure 8(b), which relates to joinder of Defendants within an indictment, and asked the Court to take judicial notice of the transcript of the suppression hearing in the instant case (Filing No. 24).

FACTUAL BACKGROUND

Fonseca is charged in a one-count Indictment with, on or about September 23, 2004, possession with intent to distribute of 500 grams or more of a mixture or substance containing methamphetamine. (Filing No. 1.) Borboa and Reyes are charged in a separate case in a one-count Indictment with, from an unknown date but at least as early

¹Further references to the record are to 8:04CR451.

as September 1, 2004, up to and including September 23, 2004, with conspiring to distribute or possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine (Count I). (8:05CR24, Filing No. 1.)

The transcript of the suppression hearing in Fonseca's case indicates a connection between Fonseca, a/k/a Filipe, and an individual referred to as "Omar," whose name is apparently "George" or "Omar Barboa." (TR 19:3; 23:17-18.) The transcript reflects Omar's statement that "his party" was arrested in what was later determined to be Russell, Kansas. (TR 23:13-15.) The transcript indicates that the vehicle that arrived with the methamphetamine was licensed in Missouri and registered to "Gerardo Quisada," who lives "[s]omewhere in Kansas – or in Missouri." (TR 33:22-25; 34:3-4.) The only other individual discussed in the transcript is the cooperating witness, Daniel Blumel. The transcript makes no reference to Jhovannie Reyes.²

Upon viewing the Indictment in 8:05CR24, the Court discovered that the Defendant Guillermo Borboa's alias is "Omar Borboa."

DISCUSSION

Pursuant to 28 U.S.C. § 636(b)(1)(A) and NECrimR 57.2, the Court has reviewed the order from which this appeal has been taken. In an appeal from a magistrate judge's order on a pretrial matter within 28 U.S.C. § 636(b)(1)(A), a district court may modify, set aside, or remand any part of the magistrate judge's order shown to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); NECrimR 57.2(c).

²Reyes has not yet appeared.

The Magistrate Judge permitted joinder pursuant to Rule 8(b) due to "representations made on the record during the motion to suppress, [which] clarify a factual connection to the counts charged against each defendant." (Filing No. 34, at 1.)

Federal Rule of Criminal Procedure 13 provides: "The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." Discussion of Rule 13 relates in part to Rule 8(b), which allows two or more defendants to be charged in a single indictment or information if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Fed. R. Crim. P. 8(b).

Applying these principles, given the knowledge of the Defendant, Guillermo Borboa's alias as Omar Borboa, the transcript of Fonseca's suppression hearing provides sufficient support that the three Defendants are alleged to have participated in the same series of acts or transactions constituting an offense or offenses.

IT IS ORDERED:

1. The Defendant's Statement of Appeal of the Magistrate Judge's Order consolidating this case with *United States v. Guillermo Borboa and Jhovannie Reyes*, 8:05CR24, for trial, also considered as a motion to sever (Filing No. 35) is denied; and
2. The Magistrate Judge's Order (Filing No. 34) is affirmed;

DATED this 27th day of April, 2005.

BY THE COURT:

s/Laurie Smith Camp
Laurie Smith Camp
United States District Judge